

REMARKS

Claims 1-18 and 20-28 are pending in the application and are finally rejected. Claims 1-18 are canceled herein. Claims 20 and 24 are amended herein.

Correction of "Statement of Common Ownership"

The "Statement of Common Ownership" made in the Amendment filed July 7, 2006 is partially incorrect. To the extent the Statement is incorrect, errors made in the Statement were made without deceptive intent.

The Statement correctly identifies the present application, U.S. Patent Application No. 10/828,765 as having been commonly owned by Aerogen, Inc. with each of U.S. Patent Application Nos. 10/883,115, 10/957,321, and 11/080,279 at the time the invention was made. The Statement incorrectly identifies Nektar Therapeutics as the current owner of all four applications. While Nektar Therapeutics has acquired Aerogen, Inc., ownership of all four applications has remained with Aerogen, Inc.

Double-Patenting Rejections

In view of the correction above, it is believed that the terminal disclaimers filed on July 7, 2006 are defective. A separate paper is accordingly filed concurrently herewith, withdrawing the terminal disclaimers. Applicants understand that there are outstanding provisional obviousness-type double patenting rejections. Should those provisional rejections mature into double-patenting rejections, consideration will be given to filing a substitute terminal disclaimer.

Claim Rejections Under 35 USC 103

Since claims 1-18 have been canceled, the rejection is moot with respect to these claims.

The language of claims 20 and 23 has been amended to more clearly point out and distinctly claim the subject matter of Applicants' invention. The limitations of claims 20 and 23

have been previously presented and examined, and therefore do not raise issues that would require further consideration and/or search.

In rejecting claim 20, the Examiner contends that Downs teaches that pressure-generating circuits 12 and 14 have a higher volume flow of gas than the conduit branch 16, which meets the definition of a respiratory circuit, and that Berggren et al teach introducing an aerosolized medicament into a lower volume flow of gas in the respiratory circuit. (page 3 of Office Action). Applicants respectfully disagree and contend that neither Downs nor Berggren et al, alone or in combination, teach or suggest the claimed method of respiratory therapy comprising the steps of providing a lower volume flow of gas in a pressure assisted breathing system and introducing aerosolized medicament into that lower volume flow of gas. As disclosed in the present application, the method of claims 20 and 23 significantly reduces the losses of aerosol in the system.

Applicants respectfully request that the Examiner specifically point out where in either reference there is a disclosure or even a suggestion that gas flows in the circuits taught by the references are different, and furthermore, that aerosolized medicament is introduced into the lower gas flow. Applicants submit that this combination of steps is novel and nonobvious.

In fact, Downs teaches away from two different gas flows by describing conduit branch 16 as merely an extension of conduit 14 in the delivery of gas to the patient. For example, see col. 3, lines 55-57 ("...having connected thereto a gas delivery conduit 14 for delivery of a suitable breathing gas mixture via conduit branch 16 to patient 18.") and col. 4, lines 28-30: ("A continuous supply of breathing gas is provided from ventilator system 12 via conduits 14 and 16 to patient 18."). Given the disclosure of Downs, one skilled in the art would not expect the gas flow to be any different in conduits 14 and 16.

Berggren et al merely establishes that it is old to deliver medicament to a patient by aerosolizing the medicament and introducing the aerosol into a circuit of a CPAP system. As with Downs, Berggren et al does not teach or suggest, either in Fig. 1 or in the accompanying discussion, providing a respiratory circuit with a lower volume gas flow and introducing the aerosol in that gas flow. As pointed out in Applicants' previous response, it is clear that Berggren et al fail to recognize the benefit of introducing the aerosol into a lower volume flow of gas to minimize the loss of aerosol in the CPAP system.

In light of the amendment of the claims and the above discussion, Applicants respectfully request that the Examiner reconsider and withdraw the final rejection.

CONCLUSION

It is respectfully submitted that entry of this amendment is proper under 37 CFR 1.116 (b) because all of the claims, if amended as proposed, avoid the rejections set forth in the final office action for the reasons set forth above, and therefore are in condition for allowance, or are placed in better condition for appeal. In addition, entry of this amendment is proper under 37 CFR 1.116 (c) because the primary reference Downs is newly cited in the final office action. This fact is good and sufficient reason why this amendment is now necessary and was not presented earlier. In light of the above, entry of this amendment and the issuance of a formal Notice of Allowance at an early date is respectfully requested.

If the Examiner believes a telephone conference would expedite prosecution of this application, please telephone the undersigned at 303-571-4000.

Respectfully submitted,

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